SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. 225

ATLANTIC COAST LINE RAILROAD COMPANY,
PETITIONER,

versus

MARCELLA DRIGGERS, AS ADMINISTRATRIX OF WILLIAM A. DRIGGERS, DECEASED, RESPONDENT.

BRIEF FOR PETITIONER.

Official Report.

The decision of the Supreme Court of South Carolina has not yet been officially reported.

It is found on page 113 of the record.

Statement of Grounds of Jurisdiction.

The date of the judgment sought to be reviewed herein is March 28, 1928.

This action was tried and decided by the State courts under the Federal Employers' Liability Act of 1908 (R., 1, 90, 91, and opinion of State supreme court, page 113 of record). Judgment was rendered for plaintiff for twenty-five thousand ($25,000) dollars (R., 1, 13), and petitioner's motion for a new trial was denied (R., 97), and petitioner appealed to the State supreme court. The judgment was affirmed by the South Carolina Supreme Court (R., 113). Justice Cothran dissented.

The jurisdiction of this Court is invoked under the Federal Employers' Liability Act of 1908, as amended, and under Judicial Code, Section 237, as amended by Act of Congress, September 6, 1916, chap. 448, Sec. 2, and Act of February 13, 1925, chap. 229, Sec. 1.

The cases believed to sustain the jurisdiction of this Court are:

Chicago, M. & St. P. R. Co. vs. Coogan, 271 U. S., 427.

Southern Ry. vs. Gray, 241 U. S., 333.

St. Louis, San Francisco Ry. vs. Mills, 271 U. S., 344.

Pheasant vs. Director General of Railroads, 285 Fed., 342 (3rd C. C. A.).

Chesapeake & Ohio R. Co. vs. Nixon, 271 U. S., 218.

Toledo, St. L. & W. R. Co. vs. Allen, Dec. Feb. 20, 1928 (72 L. Ed., 267, Adv. Sheets March 1, 1928).

Statement of Case.

All of the relevant evidence, as well as the instructions claimed by petitioner to have been erroneously given or refused by the State court, are fully set out in the petition, and are fully stated and set out in the body of this brief insofar as necessary to a discussion of the several questions involved; repetition here will, therefore, be unnecessary.

Point I.

There is no evidence whatever to show negligence as charged proximately causing intestate's death, but the undisputed evidence shows that his death was caused solely by his own act or omission.

Numerous decisions of this Court established the rule that, in an action under the Federal Employers' Liability Act, the burden is on plaintiff to prove some definite act of negligence.

St. L., S. F. R. Co. vs. Mills, 271 U. S., 344.
Patton vs. Texas & P. R. Co., 179 U. S., 658.

> "The employer is liable for injury or death resulting in whole or in part from negligence specified in the act; and proof of which negligence is essential to recovery. *The kind or amount of evidence required to establish it* is not subject to the control of the several States. This Court will examine the record, and if it is found that, as a matter of law, the evidence is not sufficient to sustain a finding that the carrier's negligence was a cause of the death, judg-

ment will be reversed." Citing cases. (Italics ours.)

Chicago, M. & St. P. R. Co. vs. Coogan, 271 U. S., 472, 474.

It is also held in the *Mills* case, *supra,* that the evidence must point to the essential fact which the jury is required to find, in order to sustain the verdict, and that it is reversible error to submit an issue of negligence to the jury where there is no evidence fairly tending to prove it without the necessity of conjecture.

Under these well established rules, not only is there no evidence whatever to prove negligence in the respects alleged, but the undisputed evidence in the record expressly negatives and disproves all of the allegations of negligence relied on. The grounds of alleged negligence apparently relied on by the State supreme court to fasten liability upon petitioner are thus stated in its opinion (R., 116):

> "On a track where his vision was obstructed by billboards, shrubbery and bushes, and the failure on the part of the engineer to slacken his speed, blow his whistle, keep a proper lookout or to take any precaution to keep his train under control at a place where he knew constant switching was going on, and his failure to take such precaution in the face of the signal he could have seen conductor MacDonald giving to plaintiff's intestate, were acts of negligence, and, certainly were questions to be submitted to a jury to determine whether or not they constituted negligence."

This statement appears to have been taken bodily from the respondent's brief below.

We will consider *seriatim* the grounds of negligence alleged and relied on and above enumerated by the State court. One of the principal grounds asserted is that intestate's view of the approaching train was obstructed by billboards and bushes. We contend that the question of obstruction of the employee's view is properly not involved in this case, because, under the undisputed facts, there was no obstruction whatever of intestate's view in any real or legal sense. The only obstruction to an employee's view at his place of work which would be material on the question of liability would be one which deprived him of a reasonable opportunity to see and avoid impending danger, and the undisputed evidence to which we now refer conclusively shows there was no such obstruction at the place of the accident. The plat and picture of the scene of the accident (R., 50) show that the spur track called Etiwan Lead in the testimony, which intestate's switch engine was pulling out of at the time of the fatal accident, crosses Meeting Street and curves thence southerly into petitioner's northbound track, the accident having occurred at the switch where intestate stepped off between the northbound and southbound tracks immediately into and against the pilot of the engine of train 79. The distance from Meeting Street Road to the northbound main track, measured perpendicularly, is about six car-lengths or 240 or 250 feet (R., 35). While the evidence shows that the view toward the north from that spur track is obstructed by billboards and shrub-

bery for about half the distance from Meeting Street Road to the main line (R., 33, 35), when intestate's switch engine had reached a point half way between Meeting Street Road and the main-line tracks, *or about 120 to 125 feet*, measuring perpendicularly, from the northbound main line, a train approaching on the southbound main line, as No. 79 was, *could be seen fully 2,000 feet or more to the north* (R., 35, 75, 54, 76, 60). These facts are testified to, without contradiction, by respondent's principal witness, McDonald (R., 29, 30, 33 and 35), who witnessed the accident, as well as by all of the other witnesses testifying thereon. The photograph of the tracks and *locus in quo* in the record just preceding the plat (R., 50) was taken with the camera on the southbound main line about *1,000 feet* north of Etiwan Lead switch where the accident occurred, and the "men" are standing on the Etiwan Lead spur about 270 feet from the switch point, and the photographer testifying for plaintiff, stated that these men could clearly see him when he took the picture (R., 16), which, of course, is necessarily true, and further testified that these men, 270 feet around the curve of the switch from where the accident occurred, could have been seen at a greater distance than 1,000 feet (R., 35, 36). Respondent's witness, McDonald, also testified that a man standing on the footboard of a switch engine at the point where the "men" are standing on the switch in the picture, could see a train approaching on the southbound track a considerable distance north of where the camera was placed, and could even have seen such train just as well if standing a little nearer Meet-

ing Street Road and farther from the point of the accident. Petitioner contends that this undisputed evidence not only does not tend to prove that intestate's view of trains on the southbound main line was obstructed, but affirmatively and conclusively shows that he had a full, open view of the approaching train which struck him, for 120 or more feet, by perpendicular measurement, from the main line and of more than 270 feet along the Etiwan Lead curve to the switch point where he was struck. A calculation shows that when the switch engine, which was running at the speed of six miles an hour, was 270 feet from the switch point, train No. 79, if running at 50 miles an hour, was 2,249.8 feet from the same point, and when the switch engine was 100 feet from the switch point traveling at the same speed, No. 79 was 833 feet away, or less than the distance from where the picture above mentioned was taken, and in plain view then and, in fact, at all times after the switch engine had reached a point half way between Meeting Street Road and the main line. If the purpose of an open view is to enable an employee to look for possible danger and avoid it, the intestate had it here in full measure. If the width and scope of the view required is not to be determined by the opportunity it affords to look for and see impending or possible danger to the employee, we are wholly unable to perceive or understand the criterion which should be adopted. We know of no decision suggesting any other standard, either in the case of an employee, or even in case of the driver of a vehicle at a public highway crossing. Certainly, the railroad company owes no greater obligation to an

employee familiar, as here, with the physical surroundings, and who assumes the ordinary risks of his employment, than it owes to the driver of the vehicle at a public highway crossing; and in the recent leading case of *Baltimore and Ohio R. R. vs. Goodman*, dec. Oct. 31, 1927, the court apparently held that the decedent's negligence was the sole cause of his own death, where he was familiar with the crossing and crossed without stopping or looking, as against the objection that intestate "had no practical view" until he was about *twenty feet* from the first rail or about twelve feet from the danger. Intestate here was fully conversant with his surroundings, having worked there for six or seven months (R., 25).

It may be noted, in passing, that there was no evidence to show whether the alleged obstructions of billboards and shrubbery were on or off petitioner's right of way, and petitioner seasonably moved to strike such allegations from the complaint (R., 8) on the ground that the allegation apparently referred to obstructions on land not belonging to defendant, which motion was denied. The State Supreme Court held in its opinion that it was immaterial whether the alleged obstructions were on or off petitioner's property.

Petitioner submits, therefore, that the evidence does not tend to prove, but wholly negatives, the allegation that intestate's view was obstructed, and the State courts erred in submitting and sustaining this issue of negligence (R., 104, 105, 106).

The State courts likewise plainly erred in holding that there was evidence of negligence in failing to blow

the whistle or give proper signals. Respondent's witness, the conductor, heard No. 79 blow north of the switch. The towerman at Southern Connection Tower, which is about 2,000 feet or one-fourth of a mile north of Etiwan Lead (R., 54), heard it give *four long blows* just opposite or after passing the tower. This would indicate that the blowing continued for some distance after passing the tower. Even at the tower, the evidence shows that train No. 79 was plainly visible from a point on the switch 270 feet from the switch point. The engineer testified (R., 63) that he blew as he passed Southern Connection, and the bell was ringing all the way down, and the fireman testified that the engineer had just finished blowing the whistle for the block at Magnolia Crossing when the accident happened (R., 77), and that the bell was ringing even after the train had stopped after the accident. He also testified that there was a crossing at Southern Connection Tower, and the road crossing signal was given for that, and the whistle was blown almost continuously along there (R., 77). The conductor, who had himself heard the train blow on approaching, testified that it did not blow "right on to him," meaning intestate, but it is obvious that there was no reason whatever for blowing "right on to him," as his danger was not apparent or discernible until almost the very moment of impact, because the undisputed evidence is that intestate, as he stepped off the switch engine, "stepped into 79 there;" "he swung into it, the pilot sill of the engine, as he stepped off" (R., 30, 36). It must also be remembered in this

connection that the switch engine was moving and did not arrive at the switch point until practically the same time that No. 79 reached there. Also, the switch engine was approaching and preparing to enter the northbound main line while No. 79 was on the southbound main line. The evidence further shows that the engineer could not see a man stepping in front of his engine on the other side within less than fifteen or twenty feet in front of the engine. Under the facts, it is plain that neither the engineer nor fireman of train No. 79 had any reason to apprehend intestate would step in front of their engine, until he actually did so, and then it was too late to give any warning or do aught else to protect him. The engineer was keeping a proper lookout just before this accident (R., 68), and saw a Southern Railway engine switching crew at work there about opposite where the accient happened (R., 68). He saw intestate's switch engine coming out of the Etiwan Lead for the northbound track, but was naturally not expecting to find anybody on the southbound track at that place (R., 68), and had never seen the switching crew operating on the southbound track there (R., 69).

The foregoing evidence affirmatively shows, without dispute, that ample signals were given of the passenger train's approach, and it is further shown by the evidence that the engineer of the passenger train had no reasonable cause to apprehend or believe that intestate or anyone else would be on the track at the place of the accident. At this point we may refer to an argument advanced by the respondent below, and apparently relied on by the State Supreme Court in the excerpt from

its opinion quoted, *supra*, at page 3 of this brief, namely, that the engineer of No. 79 should have seen the signals which conductor McDonald attempted to give to intestate to prevent him from stepping off the footboard, and should have inferred from such signals that intestate or someone was about to get in front of train No. 79 on the southbound track. We submit that this argument demands of the engineer a prescience not reasonably warranted by the facts or physical situation. If intestate, who was looking directly at the conductor when the latter was attempting to signal intestate, did not understand the meaning or purpose of the conductor's signals (R., 29, 31), but mistook the signal of warning for one meaning that the switch engine was to back up to the Seaboard track, as the conductor testified, then how could it be expected, with any show of reason, that the engineer could have understood the conductor's signals to intestate to mean that someone was in a place of danger on the Southbound track? The engineer testified that he did not recognize conductor McDonald, although he may have seen him. Petitioner submits that it is pure conjecture and speculation to say the engineer of No. 79 could have understood the conductor's warning signals to intestate at all, or could have done anything to prevent injuring intestate, who stepped immediately in front of the engine on the fireman's side, if the engineer had understood or guessed at the meaning of the conductor's signals; assuming, of course, that he saw them, which the evidence does not show. Besides, it does not appear from the evidence how soon before intestate stepped

off the footboard into the pilot of No. 79, the conductor gave the signal to intestate (R., 28, 31, 38). The evidence rather intimates that the conductor gave intestate the warning to stay on the footboard at the time, or just a moment before, intestate stepped off, as appears from the following questions and answers on page 38 of the record:

> "Q. It *looked like* Driggers was going to step off?
>
> "A. Yes, sir.
>
> "Q. You gave him a warning to stay on the footboard?
>
> "A. Yes, sir." (Italics ours.)

If the conductor gave intestate the warning to stay on the footboard at about the instant he stepped off, then, obviously, the engineer of No. 79 could have done nothing effective to prevent the accident, even if he had seen and understood the conductor's warning signals to intestate.

Petitioner submits, therefore, that the foregoing argument of respondent as to the duty of the engineer to see and act on the conductor's signals to intestate, is based solely on conjecture.

St. L. & San Francisco R. Co. vs. Mills, supra.

While petitioner has heretofore assumed, in discussing the evidence, that signal of the passenger train's approach for the benefit of employees at the point of the accident, might be required by law, we submit that, under the facts and applicable decisions, no signals would be required. Respondent's witness,

McDonald, testified (R., 40) that the place of the accident was in the yard limits. Neither intestate nor anyone else was seen on the track by the engineer, who testified that he was keeping a proper lookout, and in fact, intestate never did get on the track, but was struck immediately as he stepped into the pilot of engine No. 79 in stepping off of his own engine, which was just entering the *northbound* track. The place of the accident was not at or immediately near any public crossing or other point for which signals were required by the rules to be given. Intestate was an experienced railroad man, and had worked on that switching crew for six or seven months, and the crew had used the Etiwan Lead nearly every day. Nor was there any evidence of a custom for main line trains or any other trains to give signals in passing that point or elsewhere in or out of the yard. Under these facts, we do not think that the engineer of passenger train No. 79, which was a regular scheduled train, was required to give any signals.

In the case of *Director General vs. Templin*, 268 Fed., 483 (3rd Circuit Court of Appeals), in which *writ of certiorari* was denied by this Court, 254 U. S. 556, the facts were somewhat analogous to those of the present case, and are thus stated in the opinion:

> "The facts of the case are briefly these: Preparatory to making a stop, Templin's train was moving slowly on a sidetrack next to the southbound main line in defendant's yard at Reading, Pennsylvania. While his train was still moving, Templin jumped down from between two box cars into the space between his train and the

> southbound track, on which an express train was rapidly approaching from the rear. The clearance being insufficient, Templin was struck and killed."

The negligence charged was in failing to give timely warning and signal, "contrary to prevailing custom, adequately to warn the decedent of a train approaching from the rear." The court says that the jury found such a custom of warning to have existed, and that decedent was presumed to have known it, and the holding seems to be based solely on this finding, and it appears from the following quotation from the opinion that, had there not been such a custom of giving warning proved, the judgment must have been for defendant. The court says:

> "The defendant next raised a question of the decedent's assumption of risk and of error in the court's charge in respect thereto, pursuing the question on the theory that express trains moving on the main track did frequently approach, overtake and pass freight trains on the next track without warning; and that the decedent knew it, and, because of this fact and his knowledge of it, the decedent assumed the risks incident to it, citing familiar cases of yard accidents where there existed no custom as to warning and where from the very nature of yard movements warnings were impracticable.
>
> "In raising this question defendant has disregarded the fact and *effect of the custom found*, in which is implied, first, the need of warning, and second, the practicability of giving warning. In Aerkfet v. Humphreys, 145 U. S. 418, 12 Sup.

Ct. 835, 36 L. Ed. 758, *where no custom of warning was involved*, the court held that a yard track employee assumed the risk of the danger of a shifting movement without warning; and in Connelley *v.* Pennsylvania R. Co., 228 Fed. 322, 142 C. C. A. 614, where likewise no question of custom as to warning was involved, and where practically all the tracks in the yard were main tracks, this court made a similar ruling. The case at bar is readily distinguishable from these two cases on which the defendant mainly relies and from two others recently decided by this Court. Hines, Director General *v.* Jasko, 266 Fed. 336, and Erie R. Co. *v.* Healy, 266 Fed. 342. In the first, there being no sufficient proof of custom affecting or defining the duty of the railroad company to warn yard employees of coupling movements, we held that the defendant railroad company had not been shown *guilty of negligence* in the absence of proof of what warning under the circumstances it should and could have given, and that, in consequence, the yard employee had assumed the risks of such movements on accepting his employment. So also in the latter case we found, in the absence of proof of a custom as to warning, a similar assumption of risk by a yard employee. But in McGovern *v.* P. & R. Ry. Co., 235 U. S. 389, 401, 35 Sup Ct. 127, 59 L. Ed. 283, where there was evidence of a custom or practice to warn trackworkers the Supreme Court affirmed the action of the trial court in refusing to hold as a matter of law that the injured workman had assumed the risk of the danger and in submitting the question to the jury." (Italics ours.)

The discussion and cases cited clearly show that, in the absence of custom to give warning of the train's approach to yard employees, there would have been no negligence in failing to give signals. See also the cases there cited.

In the case of *Pheasant* vs. *Director General of Railroads*, 285 Fed., 342 (3d C. C. A.), decedent, a locomotive engineer, with his fireman, was walking down the track, when suddenly the fireman heard a train behind and jumped, but the engineer failed to jump in time and was struck by the train. The only evidence of a possible signal having been given of the train's approach was that a locomotive whistle was heard by decedent's companion a short time before the accident, but, apparently, it was not positively proved that this signal was given by the locomotive which struck decedent. On pages 344 and 345 of the opinion the court says:

> "To sustain the charge that the Reading was negligent because of the failure of its engineer to give the decedent timely warning, we find no affirmance evidence. Point is made of the presence of a crossing just west of the tower and the claim is made that the engineer failed to blow for it, but there is no evidence that it was a public road-crossing calling for the statutory warning by bell and whistle. Opposed to her claim of insufficient warning the plaintiff herself proved that somewhere, and at a time within which the two men walked less than one hundred and fifty feet, a locomotive whistle blew and was heard by the decedent's companion. (This was before the blast which immediately preceded the accident.)

She then produced no evidence even suggesting the possibility that the whistle was sounded by a locomotive other than the one which struck the decedent. And here the evidence stops—in so far as it effects the Reading. It continues, however, by showing negligence on the part of the decedent himself. While such negligence is contributory, and evidence of it is admitted under the Federal Employers' Liability Act ordinarily in diminution of damages, it is, nevertheless, a bar to recovery when it is clear that the proximate cause of the injury, or, stating it, perhaps, more accurately, when it appears that the decedent's death was caused solely by his own carelessness. Virginian Railway Co. *v.* Linkous, 230 Fed. 88, 93, 144 C. C. A. 386, affirmed on rehearing, 235 Fed. 49, 148 C. C. A. 543, certiorari denied, see Linkous *v.* Virginian Ry. Co., 242 U. S. 630, 37 Sup. Ct. 15, 61 L. Ed. 537; Director General of Railroads *v.* Templin, Admx. (C. C. A.), 268 Fed., 483. Such we are constrained to believe is the conclusion inevitably to be drawn from the evidence of this case."

The case of *Chesapeake & Ohio Ry. Co. vs. Nixon*, 271 U. S., 218, involved injury to an experienced section foreman, who was run down by a train while on a velocipede, going to his work from his home. Referring to a contention that the engineer owed decedent an active duty to keep a lookout, the court said:

"If the accident had happened an hour later when the deceased was inspecting the track, we think that there is no doubt that he would be

held to have assumed the risk, and to have understood, as he instructed his men, that he must rely upon his own watchfulness and keep out of the way. The railroad company was entitled to expect that self-protection from its employees. Aerkfetz v. Humphreys, 145 U. S., 418; 36 L. ed., 758; 12 Sup. Ct. Rep., 825; Boldt v. Pennsylvania R. Co., 245 U. S., 441, 445, 446; 62 L. ed., 385, 389; 38 Sup. Ct. Rep., 139; 19 N. C. C. A., 401; Connelly v. Pennsylvania R. Co., 47 L. R. A. (N. S.), 867; 119 C. C. A., 392; 201 Fed., 54; Davis v. Philadelphia & R. R. Co. (D. C.) (220), 276 Fed., 187; Pennsylvania R. Co. v. Wachter, 60 Md., 395; 4 Elliott, Railroads, 3d ed., Sec. 1862. The duty of the railroad company toward this class of employees was not affected by that which it might owe to others."

This rule has been applied to switchmen and yard employees, as well as track employees, and should be particularly applicable here, where the engine which struck intestate was a regular scheduled passenger train (R., 48), and the intestate was struck at a place where signals were not required by any rule, and intestate could not be seen by the engineer at any time after he had gotten in a place of danger. See *Toledo, St. L. & W. R. Co. vs. Allen*, dec. Feb. 20, 1928 (U. S. Sup. Ct.).

The case of *Davis vs. Philadelphia & R. Ry. Co.*, 276 Fed., 187, involved the death of a trackwalker, struck by a main line train from behind. Decedent could have been seen from the engine after reaching a point 2,200 feet from the place of the accident, and no warn-

ing signal was given, but it did not appear that he was seen by those on the engine, and the train was operated in the usual manner. It was held that there could be no recovery, on the ground that decedent was injured as a result of the ordinary risk of his employment. The court referred to the case of *Seaboard Air Line Ry. Co. vs. Koennecke*, 239 U. S., 352, and other cases which permitted a recovery for injuries received on main line track where no signals were given, and thus distinguished such cases:

> "On examination of the cases where recovery was allowed for accidents occurring on main line tracks, it will be observed that failure to observe a known rule or order of the company, coupled with want of reasonable care, is assigned as a foundation upon which such recovery is rested. In the cases depended on by defendant's counsel, the distinction from the case in hand may be noted as bearing on the conclusion reached."

In the *Koennecke* case it may be noted, the train was backing into the yard on the main track, without a lookout in front, in direct violation of a rule of the company, which clearly distinguishes it from the present case.

Another ground of negligence alleged and relied on by respondent (R., 3) and submitted to the jury (R., 81, 82) was in operating the passenger train at a speed limit greatly in excess of that allowed by the rules and regulations of the railroad company, and greatly in excess of the speed at which trains are allowed to be

operated within its yards. This ground of negligence is also not proved by any evidence, but is expressly negatived by the evidence. The speed of passenger train No. 79 is given by the witnesses as having been from thirty-five or forty to fifty miles an hour, the latter being the maximum speed testified to by any witness (R., 61, 54, 72, 76, 41). Respondent's principal witness, the conductor, McDonald, did not know whether the speed limit at the point of the accident was forty or fifty miles an hour (R., 41), but the rules put in evidence, and testimony of other witnesses, show conclusively that the speed limit for train No. 79, a local passenger train, at that point, was fifty miles an hour (R., 68, 48, 49). "First class trains," such as this passenger train, had a speed limit of fifty miles an hour except at certain "points," where "semaphore interlocking signals are in service," which points are stated in the rules put in evidence (R., 48, 50). The nearest one of these points to the place of accident is (R., 49) "Southern Connection (main line train)," where the limit for passenger trains is forty miles an hour, but Etiwan Lead switch, where the accident occurred, is about 2,000 feet south of Southern Connection, between that and Magnolia Avenue Tower (R., 54, 52). The term "Southern Connection" as there used means only the signal tower itself (R., 56). This fact is also indicated by the manner in which the signal points are listed in the speed limitation instructions (R., 48, 49).

Petitioner further submits, in this connection, that even if the evidence had shown that the speed limit

was violated at the place of the accident, such fact could not possibly have been a proximate cause of the accident, for the reason that intestate stepped immediately in front of the approaching train, and the rate of speed of the train, whether it was running at forty or fifty or more miles an hour, was not a contributing cause of the accident. This obvious proposition is illustrated by the South Carolina case of *Patterson vs. Director General*, 115 S. C., 390, 396, where it was held that the speed of the train was not a proximate cause of an injury, where the railroad train did not run into plaintiff's engine, but his engine ran into the train.

A case which is in point, in principle, on the question of alleged negligence herein in failing to give signals or see intestate and stop train, is *Southern Railway Co. vs. Gray*, 241 U. S., 333. That was an action for the death of a brakeman who had gone to sleep on the track, after setting out signal lights to warn an expected passenger train, and it appeared that the engineer of the passenger train sounded the customary flagman's signal when it first became possible to see the signal lights, and almost immediately thereafter, when the engineer first saw decedent on the track, did everything possible to check the train, but was unable to stop the train before running over decedent, after seeing him on the track. The court said:

> "Negligence by the railway company is essential to a recovery; and there is not a scintilla of evidence to show this under the most favorable view of the testimony urged by counsel for

> defendant in error. When it first became possible for the engineer to see signal lights 1,254 feet away he had a right to suppose the brakeman was standing there on guard. Immediately, he says, the customary signal was sounded. *No duty to the brakeman demanded an instant effort to stop the train—the indicated danger was more than half a mile away.* Moreover, application of emergency apparatus on that moment, it appears, would not have caused a stop in time to prevent the accident. There is no evidence that the engineer could have seen the brakeman a *single moment before he did*, or omitted thereafter to do all within his power." (Italics ours.)

This language is directly applicable here. Passenger train No. 79 had given signals of its approach, although we do not think any were legally required to be given; certainly no duty to intestate, Driggers, demanded of the passenger train an effort to stop or slacken speed until intestate was on the track or in a place of danger adjacent thereto, and the undisputed evidence shows that intestate was not seen and could not be seen until practically the very moment he was struck. Intestate's engine was entering the adjacent northbound track, and he was in no danger from the approaching passenger train on the southbound track until he stepped off between the tracks, and all the evidence is that he stepped off without looking in the direction of the approaching train at the very moment the passenger train was passing, and the engineer of train No. 79 never did see him, and

the fireman only saw him as he was stepping off directly against the pilot of the passenger train. Petitioner submits, therefore, that the principle of the *Gray* case is directly applicable here.

Not only is no negligence proved herein, but it is apparent, petitioner submits, that the sole proximate cause of intestate's death was his own act or omission, in stepping from the front footboard of his own engine into the pilot of the approaching passenger train, without looking or taking any precaution whatever for his own safety. He did not look toward the north and the approaching passenger train before stepping off (R., 38). As heretofore shown, he had ample view of the approaching passenger train for a distance of 1,000 to 2,000 feet or more, at all times after he had reached a point 120 feet, measuring perpendicularly, from the main line (R., 35, 75, 60, 76), Signals had been given by the passenger train, which were heard by other employees.

It is difficult to imagine a clearer case, where the injury was caused solely by the employee's own negligence. Under such circumstances, the railroad company will not be held responsible.

Great Northern Ry. Co. vs. Wiles, 240 U. S., 444.

Another alleged ground of negligence somewhat relied on by respondent, and which was submitted to the jury by the trial court (R., 84), was in failing to provide sufficient space between petitioner's tracks to enable its employees to safely board and alight from its trains. The evidence showed that the northbound

and southbound main tracks at the point of the accident are twelve feet apart, measured perpendicularly, from center to center (R., 27), and that railroad tracks are standard and laid down with regularity, and that there is usually a standard distance between double tracks (R., 27). Petitioner submits that this constitutes no evidence of negligence. Furthermore, it is held in the recent decision of *Toledo, St. L. & W. R. Co. vs. Allen*, U. S. Sup. Ct., dec. Feb. 20, 1928:

> "The rule of law which holds the employer to ordinary care to provide his employees a reasonably safe place in which to work did not impose upon defendant an obligation to adopt or maintain any particular standard for the spacing or construction of its tracks and yards. Baltimore & O. R. Co. v. Groeger, 266 U. S. 521, 529, 69 L. Ed. 419, 424, 45 Sup. Ct. Rep. 169. Carriers, like other employers, have much freedom of choice in providing facilities and places for the use of their employees. Courts will not prescribe the space to be maintained between tracks in switching yards, nor leave such engineering questions to the uncertain and varying opinions of juries. Tuttle v. Detroit, G. H. & M. R. Co., 122 U. S. 189, 194, 30 L. Ed. 1114, 1116, 7 Sup. Ct. Rep. 1166; Randall v. Baltimore & O. R. Co., 109 U. S. 478, 482, 27 L. Ed. 1003, 1005, 3 Sup. Ct. Rep. 322; Washington & G. R. Co. v. McDade, 135 U. S. 554, 570, 34 L. Ed. 235, 241, 10 Sup. Ct. Rep. 1044. Having regard to plaintiff's knowledge of the situation, it is clear that the evidence when taken most favorably to him is not sufficient to warrant a finding that defendant failed in any duty owed

> him in respect of the space between the tracks. Missouri P. R. Co. *v.* Aeby, *supra*. The court erred in submitting that question to the jury."

The picture of the tracks in the record (R., 50, 51) shows the distance between petitioner's main line tracks, and also shows the distance between its tracks to be substantially the same as that between the two Southern Railway tracks at the right of the picture.

In closing the discussion of the question of negligence, it may be pertinent to note that the State Supreme Court held in this case, as appears from its opinion (R., 117), that the "scintilla of evidence" rule is applicable in cases decided under the Federal Employers' Liability Act. It is said:

> "In the Dutton case, *supra*, affirmed by the United States Supreme Court, this Court held that the 'scintilla of evidence' rule is applicable to cases brought under the Employers' Liability Act and that the same rule of procedure applies to the administration of that Act in the State Court as it does to the administration of State laws."

While the State Supreme Court of South Carolina did so hold in the *Dutton* case, and has so held in several other cases, including the instant case, it is submitted that this Court has never held that the "scintilla of evidence" rule is applicable in actions under the Federal Employers' Liability Act, or in any other case; on the contrary, it is the well settled rule of the Federal courts that the so-called "scintilla"

rule is not applicable in Federal courts or in cases involving Federal questions.

Hathaway vs. East Tennessee, B. & G. R. R., 29 Fed., 489-490.

Berry vs. Chase, 146 Fed., 625, 627 (Sixth Circuit, C. C. A.).

Interstate Compress vs. Agnew, 276 Fed., 882, 887 (Eighth Circuit, C. C. A.).

It is possible that the erroneous view of the State Supreme Court that this so-called rule of evidence was applicable in actions under the Federal Employers' Liability Act led it to hold that there was sufficient evidence of negligence in this case. Its further holding, implied from the above quotation from its opinion, that the question of the sufficiency and amount of evidence necessary to establish negligence is for the decision of the State courts under their own rules of evidence, is also clearly erroneous, as this Court held in the *Coogan* case that "the kind or amount of evidence required to establish it (negligence) is not subject to the control of the several States."

It is earnestly submitted that there is no evidence whatever tending to show negligence herein, and that judgment of the State Supreme Court should be reversed for this reason, irrespective of other errors hereinafter discussed.

Point II.

Under the evidence intestate assumed any risk of injury from stepping between the tracks, the danger

being obvious and he having knowledge of all relevant circumstances.

The defense of assumed risk was set up in petitioner's answer (R., 11), and was included in its exceptions on appeal (R., 99), and was also passed on by the State Supreme Court in its decision (R., 117).

The undisputed evidence shows that intestate was an experienced railroad man, and had worked for the railroad company about five years, and had worked with the yard conductor, with whom he was working when killed, for six or seven months (R., 25). His brother-in-law testified for respondent that he himself had seen intestate with the engine on the Etiwan Lead once or twice (R., 22). Intestate was a member of the switching crew and they used the Etiwan Lead switch every day, and sometimes more than once a day (R., 40). Under these facts, intestate was necessarily familiar with the physical surroundings at the place of the accident, and must have known of the dangers attendant upon his conduct in stepping off between the tracks, as he did, without taking the slightest precaution for his own safety. Train No. 79 which struck him was a regular scheduled passenger train and was about nine minutes late at Ashley Junction, several miles north of the place of the accident (R., 48). As an experienced railroad man, therefore, he would reasonably be charged with knowledge that this train might pass along at the time it was due or any time thereafter.

The law of assumed risk under the Federal Employers' Liability Act is well settled. Intestate, as an experienced switchman in the yard, assumed the or-

dinary risks of that employment, which would include the coming and going of trains.

Nixon case, *supra*.

Ackfertz vs. Humphreys, 145 U. S., 418.

With respect to *extraordinary risks*, including risks arising from the master's negligence, the rule is thus stated in *Boldt vs. Penna. R. Co.*, 245 U. S., 441, 445;

> "At common law the rule is well settled that a servant assumes *extraordinary risks* incident to his employment, or risks caused by the *master's negligence which are obvious or fully known and appreciated by him*. Shearm & Redf. Neg., 6th ed., 208; Bailey, Personal Injuries, 2d ed., Sec. 385. This general doctrine was clearly recognized in Gila Valley, G. & N. R. Co. *vs.* Hall, 232 U. S., 94, 101, 58 L. Ed., 521, 524, 34 Sup. Ct. Rep. 229; Jacobs *vs.* Southern R. Co., *supra*; Chesapeake & O. R. Co. *vs.* De Atley, 241 U. S. 310, 313, 60 L. ed. 1016, 1019, 36 Sup. Ct. Rep. 564; and Erie R. Co. *vs.* Purucker, 244 U. S. 320, 324, 61 L. ed. 1166, 1167, 37 Sup. Ct. Rep. 629." (Italics ours.)
>
> See also the recent case of *Toledo, St. L. & W. R. Co. vs. Allen, supra*.

Petitioner submits that under the facts set out and the foregoing rules of law, it is clear that intestate would assume any risk of injury by reason of the so-called obstructed view (which did not exist in fact), or by reason of the alleged insufficient width between the main line tracks. The *Allen* case, *supra*, is directly in point on the latter question, as the court there held

that an experienced car checker, familiar with the yards, assumed any risk incident to the tracks being too close together, because "the dangers were obvious and must have been fully known and appreciated by him." Under this case and the authorities cited therein, intestate would also assume the risk of injury from the passing of trains through the yards and along the main line in the yard limits, at least if they were operated in the usual manner and in accordance with the company's rules. No violation of any rule of operation is shown by the evidence herein. It is difficult to discuss questions of assumed risk with respect to negligence in a case where, as here, the record is so free of any evidence of negligence, but we respectfully submit that under the foregoing authorities the intestate would assume, either as an ordinary or extraordinary risk, all of the dangers arising from the grounds of negligence alleged and relied on by respondent. The mere fact that intestate may have momentarily forgotten that passenger train No. 79 had not passed, or may even have forgotten the possibility of trains coming along on the southbound main line, would not relieve him from the assumption of those risks.

Jacobs vs. So. Ry. Co., 241 U. S., 229.

Point III.

The State court erred in sustaining instructions that it would be a violation of law to operate the train at a high and dangerous rate of speed and in excess of the speed allowed in the yard; there being no evidence that

the speed was in violation of law or in excess of that allowed in the yards.

This assignment of error is raised by petitioner's exceptions on appeal (R., 102), and was considered by the State Supreme Court.

The trial judge gave the following instruction (R., 81, 82) in submitting this issue:

> "The next specification is (*b*):
>
> "'In operating the said train at a high and dangerous rate of speed, and at a rate of speed greatly in excess of that allowed by the rules and regulations of the defendant company, and greatly in excess of the speed at which trains are allowed to be operated by the defendant company within its yards.'
>
> "Well, it would be a *violation of law* for a railroad company to operate its train at a high and dangerous rate of speed, and in excess of that *allowed by law*, and it would be a *violation of law to operate in excess of the rate of speed allowed in the yard*. All that may be negligence and carelessness in the defendant, and if that was the direct and proximate cause of the injury to the plaintiff, the plaintiff would be entitled to recover on that act of negligence." (Italics ours.)

He also gave the following similar instruction on the subject (R., 82):

> "The next specification is subdivision (*c*):
>
> "'In operating the said train at such an excessive rate of speed as to prevent the plaintiff's intestate from getting out of the way of the

said train, and so to avoid being run over by it.'

"Well, if they did that, *that was a violation of law*, but whether or not they did that is a question for you to answer from this evidence. If the defendant did that, and that was negligence and carelessness and that negligence and carelessness was the direct and proximate cause of the plaintiff's injury and death, the plaintiff in this case would be entitled to recover on that act of negligence." (Italics ours.)

The State Supreme Court in the part of its opinion dealing with this charge (R., 122) concedes that "His Honor's language as complained of in charging that certain conduct alleged was in violation of law, has given me some trouble," but concludes that a careful reading of the whole charge convinces the court that "it was a slip of the tongue, and not prejudicial." Petitioner submits that this charge is erroneous and prejudicial in several respects. There is not a scintilla of evidence in the record tending to show that passenger train No. 79 was operated at a speed "greatly in excess of that allowed by the rules" or "greatly in excess of the speed" at which trains are allowed to be operated within the yards, or that it was operated at a dangerous rate of speed, in any legal sense; on the contrary, the undisputed evidence shows that the train did not exceed the fifty-mile limit allowed by the rules, at the point of accident (R., 68, 48, 49), and no rules are put in evidence limiting the speed of trains in yards generally. Neither is it shown that any *law* was violated by the speed of the train at the point of the accident. These instructions, therefore,

were clearly erroneous as submitting issues to the jury without any support whatever in the evidence. The language of the court that the conduct specified would be "a violation of law" would tend to indicate that some positive law prohibiting speed at the point in question was violated, but whether it be taken to mean this or to mean that such conduct was a violation of the law in a general sense, such as the general law of negligence, the instruction was nevertheless wholly unsupported by any evidence and permitted the jury to find that the petitioner was guilty of negligence in those respects and also to speculate whether there had been any "violation of law" without any evidence to show such violation, and even without any direction from the trial judge limiting their speculation or guesses as to what would constitute a violation of law. In the case of *St. Louis, S. F. R. Co. vs. Mills*, 271 U. S., 344, the court distinctly held that it was reversible error to submit to the jury distinct issues of fact, which were without any support in the evidence. The court said:

> "The evidence must at least point to the essential fact which the jury is required to find in order to sustain the verdict."

The prejudicial effect of these instructions is emphasized by the court's further charge, in concluding his submission of the issues (R., 87), that plaintiff must recover, if at all, "on *one* or *more* or *all* of these acts of negligence charged." In other words, the court permitted the jury to find for respondent gen-

erally on any *one* of the issues submitted, and, so far as this record shows, the jury may have found for plaintiff on the issues submitted by these instructions, which were without any support whatever in the evidence. It will also be noted from a careful reading of the instruction first set out above, submitting specification (*b*), that it really *assumes* that petitioner operated its train in excess of the rate of speed allowed in the yard and in excess of that allowed by law, as the instruction does not require a finding of these facts. Errors in instructions are presumptively injurious and ground for reversal, unless it affirmatively appears that they were harmless. These instructions are plainly erroneous and prejudicial in submitting important issues and questions of fact to the jury, without any supporting evidence.

Mills case, *supra*.

Fillippon vs. Albion Vein Slate Co., 250 U. S., 76.

Point IV.

The State court erred in sustaining an instruction that an employee does not assume any extraordinary hazards or risks, and in sustaining refusal of a correct charge requested by petitioner.

This question is raised by petitioner's fifteenth and twenty-fifth exceptions (R., 101, 102, 107, 108).

The instruction given by the court on assumed risk reads:

> "Now the 9th paragraph sets up assumption of risk, and the law in regard to that is this:

> Whenever a master employs a servant, and when I say master, I mean railroad company, and when I say servant, I mean the deceased, whenever a master employs a servant, the servant assumes all the risks ordinarily incident to the work that he is employed to do. That is just as binding on the servant as a written contract. *He assumes all ordinary risks; he does not assume any extraordinary hazards or risks, just those risks connected with his work.* And if the death of the deceased was caused by an ordinary risk he assumed that; if that was the cause of his death he assumed that." (Italics ours.)

Petitioner requested the court (R., 101-102) to give the following charge on assumed risk:

> "5. I charge you that an employee may assume the risk of injury from dangers and hazards which are ordinarily incident to his employment, or which arise in the progress of their work. Some employments are necessarily dangerous and fraught with danger to the workman, danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in the contract of employment. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. Risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for

> the work, and so forth. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them. If, however, he does actually know and appreciate the danger or risk, or by the exercise of proper care and caution should have known and appreciated the danger or risk, then he is held to have assumed such risk, and cannot recover."

The trial court refused to give this requested instruction, which was petitioner's fifth request (R., 92). Petitioner submits that the charge given by the court is clearly erroneous, in that it affirmatively charges that the employee "does not assume any extraordinary hazards or risks, just those risks connected with his work."

It is well settled by numerous decisions of this Court that an employee does assume the extraordinary risks of his employment, including those due to the negligence of the employer and fellow-employees, where such risks are obvious or fully known and appreciated by the employee. In the case of *Toledo, St. L. & W. R. Co. vs. Allen, supra.*, the court said:

> "And, except as specified in Sec. 4 of the Act, the employee assumes the ordinary risks of his employment and, when obvious or fully known and appreciated by him, *the extraordinary risks and those due to negligence of his employer and fellow employees.* Boldt v. Pennsylvania R. Co. 245 U. S. 441, 445, 62 L. ed. 385, 389, 38 Sup. Ct.

Rep. 139, 19 N. C. C. A. 461; Chesapeake & O. R. Co. v. Nixon, 271 U. S. 218, 70 L. ed. 914, 46 Sup. Ct. Rep. 495. If, upon an examination of the record, it is found that as a matter of law the evidence is not sufficient to sustain the essential findings of fact, the judgment will be reversed. Chicago, M. & St. P. R. Co. v. Coogan, 271 U. S. 472, 474, 70 L. Ed. 1041, 1043, 46 Sup. Ct. Rep. 564." (Italics ours.)

It will be noted that the instruction given by the court was confined solely to the "ordinary risks" of the employment. Referring to a somewhat similar question, the court, in *Chesapeake & O. R. Co. vs. De Atley*, 241 U. S., 310, 316, said:

"Error is assigned to the refusal of the trial court to instruct the jury as follows: That when plaintiff entered defendant's service as brakeman he assumed all the ordinary risks and hazards of that employment, and if the jury should believe from the evidence that his injuries were the natural and direct result of any of such risks or hazards they must find for the defendant. The instruction thus requested was defective, and there was no error in refusing to give it in this form, *since it embodied no definition of 'ordinary risk or hazards,'* nor any qualification appropriate to the particular facts of the case. The gravamen of plaintiff's complaint, as developed at the trial, and the sole theory upon which the case was submitted to the jury, was that the negligence of the engineer in operating the train at an unduly high rate of speed created an unusual and extraordinary hazard. *An instruction upon the ques-*

> *tions of assumption of risk, dealing solely with the ordinary hazards of the employment and not pointing out that a different rule must be applied with respect to an extraordinary 'risk attributable to the engineer's negligence' would probably have confused and misled the jury.*" (Italics ours.)

The instruction given in the present case, like that given in the *De Atley* case, embodied no definition of "ordinary risks and hazards," nor did it define in any way the words "extraordinary hazards or risks." It is clear, therefore, that the instruction is erroneous under these decisions. However, the State Supreme Court, in its opinion, held that the giving of the following additional instruction avoided any misleading effect in the instruction given:

> "And there is a corresponding duty on the servant. The servant has a right to assume that the master has furnished him a reasonably safe place to work, and he does not have to make any minute inspection, or any investigation. He may assume that the master has performed his duty. But if the place is dangerous—obviously dangerous, and can be seen by the servant, and he goes on and performs his duty after *knowing that*, why he assumes that risk. He takes the risk on himself, and if he is injured on account of that, he could not hold the master for that. Suppose you were employed by a railroad to work at a certain place. You would have a right to assume that the place was reasonably safe. But if the place was not reasonably safe, was dangerous, the danger was obvious to you,

> you could see it and *knew* it, and you undertook to work in that place and you got hurt it would be your fault. Whether that happened in this case I don't know." (Italics ours.)

This instruction is, in fact (R., 84, 85), a part of the court's instruction on *negligence*, and is not given as a part of its charge on assumed risk. It will be noted that it was given in submitting specification (*i*) of negligence "in failing and omitting to furnish plaintiff's intestate with a reasonably safe place to work at, and in failing and omitting to provide sufficient space between the defendant company's tracks to enable its employees to safely board and alight from its trains while in the performance of their duties." It would appear, therefore, that the trial judge himself confused the question of negligence and assumed risk, and it is hardly likely that the jury could have obtained a clear idea of the rule from these confusing instructions. The fact that the trial judge refused petitioner's request on the subject indicates that he did not have a correct understanding of the rule with respect to extraordinary risks, including risks from the master's negligence. Moreover, the instruction given by the court in charging specification (*i*) of negligence was itself erroneous and defective because, as indicated by the italicized language, it required the employee to actually *know* of the danger before he assumed the risk therefrom. We have here, then, a clearly erroneous instruction on assumed risk, the refusal of a proper instruction on the subject, and the giving of a partial instruction on the subject, as a part of the charge on

particular issues of negligence, which was itself erroneous and misleading in requiring that the dangers be actually known, as well as be obvious. The question of assumed risk, as we have heretofore pointed out, was raised by the evidence both with respect to the assumption of ordinary risks and the extraordinary risks of the employment, including the master's negligence. The court's action in giving and refusing these instructions was clearly erroneous and misleading, and must necessarily have been prejudicial. Certainly, it cannot be said from the record that it was not prejudicial.

Fillippon vs. Albion Vein Slate Co., 250 U. S., 76.

It may be noted that the judge who tried this case is the same judge who tried the case of *Atlantic Coast Line Railroad Co., Petitioner, vs. C. M. Tyner, as Administrator of George A. Marshall*, No. 747, Oct. Term, 1927, in which this Court granted its *writ of certiorari* on March 12, 1928. The trial judge gave the same erroneous instruction on assumed risk in the *Tyner* case as that given here.

Conclusion.

If the judgment rendered against petitioner herein were permitted to stand, railroad companies would, in its opinion, become practically insurers against injuries to employees engaged in interstate commerce at the time of injury, even in cases where the injury is caused solely by the employees' own acts or neglect. Only the principal errors committed in the trial of this

case have been relied on in the petition and discussed in this brief, but, as stated in the able dissenting opinion of Cothran, J., "there are other errors in the conduct of the trial of which 'the time would fail me to tell,' but these suffice."

It is earnestly submitted that the judgment of the State court against petitioner should be reversed.

Respectfully submitted,

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